No. 15343

In the United States Court of Appeals for the Ninth Circuit

MIKE H. KOSTELAC AND MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

MIKE H. KOSTELAC AND MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT-APPELLEE

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JURISDICTIONAL STATEMENT

By contract with the United States, dated June 29, 1946, Mike H. Kostelac agreed that, for a period of five years commencing July 1, 1946, he would, at a determinable contract rate, purchase and remove the kitchen waste from the kitchens and messes at Fort Lewis, Washington. This case involves a suit by the United States against Kostelac and the Maryland

Casualty Company, surety on Kostelac's bid and performance bond, for the failure of Kostelac to carry out the terms of the agreement (R. 3–8). By way of defense, defendants counterclaimed for rescission of the contract (R. 14–18). The United States being the plaintiff in the action, the jurisdiction of the district court rests upon 28 U. S. C. 1345. The judgment of the district court (R. 81, 195–199) partially denies the United States compensation for its loss sustained as a result of Kostelac's failure to perform the contract. The jurisdiction of this Court to review the judgment of the district court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

By contract dated June 29, 1946, Mike H. Kostelac agreed to purchase and remove the kitchen waste, suitable for animal consumption, generated at the Army installation at Fort Lewis, Washington. The contract consists of an invitation to bid, including the general provisions and articles contained in the invitation, Kostelac's bid and the Government's acceptance of that bid (Exh. 1[1]). A bid bond in the penal sum of $40,000, with the Maryland Casualty Company, as surety, accompanied Kostelac's bid (Exh. 1).

By its terms the contract was to be effective for a period of five years, commencing July 1, 1946. Throughout this five-year period Kostelac agreed to remove edible kitchen waste from Fort Lewis and

[1] Though designated for printing as a part of the printed record on appeal, the exhibits (R. 70–72) have not been reproduced. The substance of the exhibits appears in the joint pretrial order (R. 53–73) and, where necessary, critical provisions are quoted at length in this brief.

agreed to pay for the kitchen waste at a rate to be determined by the population of the military installation and dependent upon the selling price of hogs of 200 pounds weight as published on the 15th day of each month at the Seattle Stock Yard Market (Exh. 1, pp. 5–6). Specifically, when hogs, good and choice, of 200 pounds weight, were selling at $0.04 per pound, Kostelac was obliged to pay for kitchen waste at the rate of $0.055 per month for each man at the installation (Exh. 1, p. 5). If the selling price of hogs were to increase during the life of the contract, provision was made for a graduated increase in the rate per man per month to be paid by Kostelac (Exh. 1, p. 5). Thus, if, in the course of the contract, the selling price of hogs were to rise to $0.20 per pound, the rate to be paid by Kostelac was to be $0.145 per man per month (Exh. 1, p. 5).

The subject matter of the contract, of course, precluded any definite representation as to the quantity of kitchen waste which would be available for sale and removal. The invitation to bid, included an estimate that the kitchen waste yield per man would be .04 pounds per day and that the average number of men at the Fort was 40,000 (Exh. 1, p. 4). However, with further reference to the quantity of waste to be available for purchase and removal, Article I of the Invitation to Bid provided as follows (Exh. 1, p. 3):

> No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon

> will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted, from time to time.

The invitation to bid specified June 21 to June 26, 1946, as inspection dates (Exh. 1, p. 1). Bidders were particularly admonished, in the invitation to bid, to inspect the subject matter offered for sale and removal.[2] Before submitting his bid, Kostelac was specifically requested by the Contracting Officer at Fort Lewis to inspect the amount of kitchen waste that was then being generated at the mess halls at Fort Lewis (R. 58, 60).

Kostelac was a man with "over twenty years [experience] in handling garbage" (R. 113). At the time he submitted his bid, Kostelac was under contract to remove kitchen waste from the Naval Base at Bremerton, Washington. Prior to 1945, he had collected kitchen waste at Scott Air Force Base and at Jefferson Barracks near St. Louis, Missouri (R. 109). Upon receipt of the invitation to bid on the Fort Lewis contract, Kostelac "inspected the garbage containers at different mess halls to see how much garbage they had" (R. 112); he talked to mess sergeants, inquired as to the number of men fed at a particular mess, looked at the kitchen waste containers to see how full they were and, knowing the approximate

[2] General Provision No. 5: "Inspection: Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the times specified in the invitation. No labor will be furnished for such purpose. In no case will failure to inspect be considered grounds for a claim."

weight of a full container, concluded that there was a yield of more than a pound of kitchen waste per day for each man fed at a mess hall (R. 112–114). Kostelac's estimate of the kitchen waste yield was in part based upon his prior kitchen waste collection experience at other military installations where, according to Kostelac, the kitchen waste yield was over a pound per day per man (R. 124). The invitation to bid, as noted above, estimated the kitchen waste yield per man per day at .04 pounds (Exh. 1, p. 4) and before submitting his bid, Kostelac was told by the Contracting Officer at Fort Lewis that his estimate of the amount of kitchen waste that would be available under the prospective agreement was too optimistic (R. 128). In spite of the written estimate of the kitchen waste yield per man and the warning that his estimate of a yield of a pound per man per day was optimistic, in submitting his bid, Kostelac apparently chose to disregard the official estimate specified in the invitation and instead based his bid upon an estimated yield of a pound of kitchen waste per man per day (R. 128).

Kostelac was awarded the contract on June 29, 1946 and commenced performance of the contract on July 1, 1946. On the 5th day of collection, the kitchen waste yield from the Fort was "10 or 11 ton" (R. 130). This amount, though considerably more per man per day than the .04 pounds estimated in the contract, was less than the yield apparently anticipated by Kostelac before submitting his bid. Shortly thereafter, Kostelac complained to the Contracting Officer that the kitchen waste he expected to

be available "[was] not there" (R. 131). He then asserted that his pre-bid estimate of the kitchen waste yield at Fort Lewis was based upon the mistaken assumption that the accumulation in the kitchen waste cans at the mess halls he examined represented a one day accumulation of kitchen waste whereas his later investigation and inspection led him to believe that there had been a two day accumulation (R. 132). On July 18, 1946, Kostelac gave written notice to the Contracting Officer that "he considered he had made a mistake" and advised of "his alleged difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage" (R. 61). Through military and congressional authority, Kostelac sought without avail to have his contract administratively modified, adjusted, cancelled, or renegotiated (R. 61–62).

From July 1 until December 15, 1946, Kostelac, in accordance with his contract, collected and removed from Fort Lewis, kitchen waste with a contract value of $24,261.16 (R. 56). Though the contract called for payment for kitchen waste removed on a monthly basis (Exh. 1, Art. D, p. 2), Kostelac failed and refused to make payment. Accordingly, after notice of default by registered mail to Kostelac and the surety on his bond (R. 55), a new contract for the balance of the five-year period was, after advertisement, relet to John DeBoer on December 13, 1946 (Exh. 2, R. 71; R. 55). The terms of the DeBoer contract were identical to the Kostelac contract but at a rate per man per month less than the rate called for by

the Kostelac contract (Exh. 2, R. 71; R. 55, 57). The contract value of the Fort Lewis kitchen waste for the period of December 16, 1946 through June 30, 1951, measured by the DeBoer contract, was $80,102.24 less than the contract value of the kitchen waste when measured by the terms of the Kostelac contract (R. 57).

For the loss sustained as a result of Kostelac's breach and repudiation of his contract, the United States, in this suit against Kostelac and the surety on his bond, sought a total of $104,363.40 which represents the contract value of kitchen waste collected and removed by Kostelac under his contract and the loss sustained by the United States as a result of the diminished return derived under the terms of the DeBoer contract (R. 3–8). By counterclaim the defendants, Kostelac and the Maryland Casualty Company, sought rescission of Kostelac's contract on the ground that the contract was entered into under a mutual or unilateral mistake of fact (R. 14–18).

The district court made findings of fact (R. 74–79) and conclusions of law (R. 80) and awarded judgment for the United States, jointly and severally, against Kostelac and the Maryland Casualty Company in the sum of $24,261.16 (R. 183), the value of the waste collected by Kostelac. In substance, the district court held that there was a valid and subsisting contract between the United States and Kostelac and that Kostelac was obliged to pay for the kitchen waste he collected and removed during the period of July 1 through December 15, 1946 (R. 78,

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198). Though acknowledging that a "rigid and narrow view of the matter would require that further damage be awarded" (R. 78, 198), the district court denied the United States full compensation for its loss for the apparent reason that Kostelac had apparently mistakenly over-estimated the kitchen waste yield at Fort Lewis. From the judgment of the district court (R. 81), the United States, Kostelac and the Maryland Casualty Company have appealed.

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in failing to compensate fully the United States for the loss sustained as a result of the breach and incomplete performance of the contract.

2. The district court erred in holding, in effect, that Mike H. Kostelac made an error or miscalculation when he prepared and submitted his bid for the kitchen waste collection contract at Fort Lewis, Washington.

3. The district court erred in holding, in effect, that the supposed mistake excused Kostelac from the complete performance of his contract and excused him from full liability for loss sustained by the United States as a result of the breach and incomplete performance of the contract.

4. The district court erred in denying judgment to the United States for the full sum of $104,363.40 with interest from July 1, 1951.

SUMMARY OF ARGUMENT

A. After five and one-half months partial performance of his five-year kitchen waste contract, Kostelac

repudiated the contract and the United States was compelled to re-let the contract for the balance of the five-year period at a rate substantially less than that called for by Kostelac's contract. A correct measure of Kostelac's liability and the Government's damage requires that the United States be awarded the performed value of the Kostelac contract less the receipts derived from the subsequent contract covering the same subject matter. In awarding the United States only the contract value of waste material collected by Kostelac and denying the United States full compensation for its loss, the district court committed plain error.

In measuring Kostelac's liability, it is immaterial that the kitchen waste yield at Fort Lewis may not have lived up to Kostelac's pre-bid expectations. The waste yield was an uncertainty inherent in the contract and not capable of precise determination. Accordingly, the invitation to bid expressly provided that any contract which might be awarded would not, in any sense, be conditioned upon the quantity of waste material to be collected. Furthermore, the invitation to bid, by way of estimate, stated that the waste yield per man per day at Fort Lewis to be approximately .04 pounds. By Kostelac's own admission, the waste yield during his brief performance under the contract was grossly in excess of this estimate. Plainly, in view of these contract terms, the alleged quantitative inadequacy of the Fort Lewis waste affords no basis for denying the United States compensation for the loss sustained as a result of Kostelac's repudiation of the contract.

B. Since Kostelac's contract was not conditioned on the quantity of waste to be collected and since the waste yield during his performance of the contract was grossly in excess of the contract estimate, Kostelac's allegedly mistaken calculation of the waste yield is immaterial to a determination of his contract liability. Similarly, his alleged mistake affords no basis for a rescission of the contract. Because quantity was not a condition of the contract, the alleged mistake was immaterial to the transaction itself, and the mistake was, in any event, due solely to Kostelac's own negligence and to the manifest inadequacy of his prebid inspection of the mess halls at Fort Lewis where the waste was generated. Furthermore, Kostelac performed under the contract long after the mistake became known to him. He collected and had available for use the waste at Fort Lewis at a time when the alleged mistake was fully known to him; and by accepting the benefits of the contract and by delaying his renunciation of the contract until December, 1946, Kostelac permitted a change in the circumstances of at least one other person interested in the contract. By reason of his delay and this change in circumstances, the United States was compelled to re-let the contract at a rate substantially less than could have been commanded had Kostelac promptly renounced the contract. These considerations, by elementary equitable standards, are fatal to any right of rescission that might otherwise have existed.

C. Kostelac's bid on the Fort Lewis waste contract was accompanied by bond guaranteeing his faithful performance of all the terms and conditions of the

contract. Manifestly, there was a virtually complete failure to perform faithfully this contract. The district court, therefore, rightly held that the surety on Kostelac's bond was, with Kostelac, liable to the United States.

ARGUMENT

Introduction

Underlying this litigation is a Government contract entered into by the United States in its sovereign capacity. The issues involved in this case have their origin in this contract and must, it is settled, be resolved by a reference to federal law. *United States* v. *Jones,* 176 F. 2d 278, 281 (C. A. 9). See also, *United States* v. *Allegheny County,* 322 U. S. 174;[3] *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367; *United States* v. *Standard Oil Co.,* 332 U. S. 301; *Board of Commissioners* v. *United States,* 308 U. S. 343; *United States* v. *Richard Starks,* decided December 21, 1956 (C. A. 7); *Girard Trust Co.* v. *United States,* 149 F. 2d 872, 874 (C. A. 3); *Woodward* v. *United States,* 167 F. 2d 774, 779 (C. A. 8). Since only federal questions are involved, there is "no room for the application of any local law" (*United States* v. *Jones,* 176 F. 2d 278, 281 (C. A. 9)) and no occasion for reference to Washington law where the contract involved was executed and should have been performed. With federal contract law as a polestar, we turn to the issues raised

[3] "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state." 322 U. S. at 183.

by the Government's appeal and by the appeal of the defendants in the court below.

I

The District Court erred in denying the United States full compensation for the loss sustained as a result of Kostelac's incomplete performance and repudiation of the contract

A. *The value of Kostelac's contract, if performed, is the correct measure of the Government's compensable loss.*—Proceeding under his contract of June 29, 1946, Kostelac, during the period July 1 through December 15, 1946, collected and removed from the Army installation at Fort Lewis, waste material of a contract value of $24,261.16. The district court awarded the United States judgment for this amount. The correctness of this aspect of the judgment is not open to serious question. Not so, however, is the court's denial of compensation for the loss sustained by the United States as a result of Kostelac's repudiation of his contract. By reason of Kostelac's failure and refusal to pay for the kitchen waste on a monthly basis as required by the contract and his failure to remedy this breach when warned to do so,[4] the Government was compelled to re-let the contract to John

[4] The following communication was addressed to Kostelac and the Maryland Casualty Company on November 27, 1946 by the Purchasing and Contracting Officer, Fort Lewis, Washington (Exh. 4, 5; R. 72):

* * * * *

You are hereby notified that the kitchen waste on subject account is being advertised for sale. However, you will be given the opportunity of remedying the default of contract presently existing (non-payment) at any time prior to the date set (13 December 1946) for opening of bids. Failing to do so, the kitchen waste will be sold to the highest bidder and the govern-

DeBoer at a contract rate substantially less than the rate called for by Kostelac's contract (Exh. 2, R. 71).

It is elemental contract and damage law that, in assaying the liability of a defaulting contractor, the value of the contract, if performed, is the yardstick of the contractor's liability. *United States* v. *McMullen,* 222 U. S. 460; *United States* v. *Behan,* 110 U. S. 338; *United States* v. *P. J. O'Donnell & Sons, Inc.,* 228 F. 2d 162 (C. A. 1); *Burstein* v. *United States,* 232 F. 2d 19 (C. A. 8); *Conti* v. *United States,* 158 F. 2d 581 (C. A. 1); *Aerial Lumber Co.* v. *United States,* No 14,554 (C. A. 9), decided August 10, 1956; cf., *McKenney* v. *Buffelen Mfg. Co.,* 232 F. 2d 5 (C. A. 9); *Restatement of Contracts,* § 329; McCormick on *Damages,* § 137. In this case, Kostelac's contract, if performed, had a contract value of $158,339.64. Deducting from this sum the collections derived under the subsequent DeBoer contract, $53,976.24, the immediate consequential loss to the United States from Kostelac's repudiation, is $104,363.40. In the absence of any contention or evidence that the DeBoer contract was not the best mitigable bargain available to the United States in the circumstances,[5] the difference

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ment will proceed against the contractor and surety to collect money now due as well as damages that will accrue if sale for account fails to bring the return specified in the subject contract.

* * * * *

[5] The disparity in the value of the two contracts is fully explained by the fact that when DeBoer assumed the Kostelac contract, he was not prepared to handle the contract (R. 191). Once Kostelac was awarded the contract, DeBoer, who had the contract for the preceding year, dismantled his hog ranch and laid off his employees (R. 191, 196–197). Being unprepared for the contract he could not, in December, 1946, bid any more on the waste material than he did (R. 191).

in the two contracts, identical except as to the price to be paid, represents the correct measure of the Government's loss and of Kostelac's liability. In limiting the Government's recovery of $24,261.16 and denying full compensation, the district court committed plain error.[6] See cases cited, *supra*.

B. *Kostelac's alleged mistake with respect to the quantity of waste to be collected does not excuse him from full liability to the United States.*—In awarding the United States only the contract value of the kitchen waste actually collected by Kostelac, the district court acknowledged that a "rigid and narrow view of the matter would require that further damage be awarded as demanded by the Government" (R. 198). In denying the Government what would otherwise be its obvious entitlement, the district court was apparently swayed by Kostelac's contention that, in submitting his bid, he had mistakenly estimated the quantity of garbage that might be expected from Fort Lewis (R. 198).[7] A full consideration of this so-called "mistake" and its consequent effect, if any, on Kostelac's liability, requires more than a consideration of the naked assertion by Kostelac that he made a mistake. For the mistake upon which he relies to avoid his contract liability assumes a very different

[6] General Provision No. 7 (Exh. 1) provided in part as follows: "* * * Unless the purchaser pays for and removes the property as required by the provisions of this contract, the Government shall have the right to dispose of the property and hold the purchaser responsible for any loss incurred by the Government as a result of a failure to pay for or remove the property; * * *."

[7] The district court found that Kostelac "made an error or miscalculation when he prepared his bid" (Fdg. V; R. 76).

color when considered against the background of circumstances which prevailed in June of 1946, when Kostelac's contract bid was submitted and accepted, and in July, 1946, when Kostelac commenced performance of his contract and first "discovered" his mistake.

1. The kitchen waste offered for sale was intended for animal consumption and Kostelac stated in his bid that the kitchen waste would be used for feeding hogs at his farm located at Gig Harbor, Washington (Exh. 1, p. 3). During the year July 1, 1945 through June, 1946, which covers the period in which Kostelac submitted his bid, Kostelac had a maximum of "about eight thousand" (R. 109) hogs, apparently sustained by kitchen waste collected by Kostelac under contract with the Bremerton Naval Base (R. 108).

The purchase price of kitchen waste was, of course, by the terms of the contract, dependent upon the selling price of hogs, a commodity which, in June, 1946, was subject to price control. At the Seattle terminal market the ceiling price of hogs in June of 1946 was fixed at $15.80 per cwt. (Maximum Price Regulation No. 469, issued September 11, 1943 (8 Fed. Reg. 12562), as amended through October 8, 1945 (10 Fed. Reg. 12653)). With the ceiling price of hogs thus fixed, the contract rate payable for kitchen waste, according to the sliding scale specified in Kostelac's bid, would have been a maximum of $0.09 per man per month (Exh. 1, p. 5).

By Section 1 of the Act of June 30, 1945, 59 Stat. 306, the Emergency Price Control Act of 1942, 56

Stat. 23, as amended (~~60~~ 50 U. S. C. A., App. 901, *et seq.*), terminated on June 30, 1946 and price control authority was not again revived until July 25, 1946. Act of July 25, 1946, Section 1, 60 Stat. 664. Thus, when Kostelac commenced performance of his contract on July 1, 1946, there also commenced a 25-day period in which the selling price of hogs was not subject to maximum price regulation. By the 15th of July, hogs on the Seattle market were selling at $20.50 per cwt. (Exh. 3, p. 3), an increase of $4.70 per cwt. over the June, 1946 ceiling price. In consequence of this increase in the market price of hogs, Kostelac, for the first month of performance of his contract, was obliged to pay at the maximum sliding scale rate of $0.145 per man per month for the kitchen waste he removed from Fort Lewis (Exh. 1, p. 5).

The termination of price control legislation on June 30, 1946, not only made it possible for an increase in the contract rate for kitchen waste, but the precipitous price rise in the hog market, in the absence of price control, served as an inducement to hog farmers to unload at a favorable market price. By the "third or fourth week" in July, 1946 (R. 159), Kostelac had "sold all [his] hogs" (R. 158) and because "[he] didn't have any hogs to feed it to" (R. 158), after the first three or four weeks of July 1946 he "dumped" the kitchen waste he collected at Fort Lewis on the ground in order "to get rid of it" (R. 158).

Kitchen waste derives its commercial value because of its suitability for hog consumption. Without hogs to feed it to, the Fort Lewis kitchen waste no doubt was valueless to Kostelac. It is not, therefore, sur-

prising that Kostelac promptly sought escape from the burdens and obligations of his contract. With the advice of counsel, he complained to military authority that he had made a mistake in over-estimating the kitchen waste yield at Fort Lewis (R. 61) and advised military authority of his "difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage" (R. 61). With a sizable kitchen waste contract but without hogs to consume the waste, the difficulty of operating a hog farm successfully and at a profit is readily apparent; one is, however, legitimately entitled to question the sincerity of a complaint as to the quantitative insufficiency of the Fort Lewis kitchen waste when the waste which was available and collected by Kostelac was in part at least (R. 140–141) dumped on the ground by him in order to get rid of it (R. 158).[8]

[8] Furthermore, the bid submitted by Kostelac on June 26, 1946 was not his first attempt to obtain the waste contract at Fort Lewis. He was a low and unsuccessful bidder on the waste contract for fiscal 1946—the contract for that year going to his competitor, John DeBoer. In early June 1946, he bid on a new contract for fiscal 1947. Again his bid was lower than that of John DeBoer. However, DeBoer was not awarded a contract because the Army cancelled the invitation and sought bids on a long term contract rather than on a yearly basis as in the past. In response to the second invitation in June 1946, calling for bids on a one to five year basis, Kostelac was the only bidder. His bid pursuant to this invitation and which led to the award of the contract here involved, was higher than his bid earlier in June 1946 (R. 148) and higher than any other comparable bid received at Fort Lewis (R. 63–64). From the competitive situation which existed between Kostelac and DeBoer, one might reasonably infer that Kostelac's high bid on June 26, 1946, after two prior unsuccessful bids, was the product of competition rather than a mistaken estimate of the waste yield.

2. Whether, however, Kostelac was in fact mistaken or merely seeking a means of escape from his contract, it is, under the terms and conditions of the contract, immaterial to his liability that the kitchen waste yield at Fort Lewis did not conform to Kostelac's expectations. As previously noted, a precise determination of the kitchen waste to be generated at Fort Lewis was inherently impossible. The yield would, of course, vary with the population of the Fort and certainly no one was in a position to foretell over an extended period what the military population might be.[9] Any estimate of the waste yield would necessarily be purely speculative and anyone bidding on the contract was possibly buying a "pig in a poke" or a "cat in a bag."[10] This element of quantitative uncertainty was undoubtedly reflected in the bid submitted by Kostelac and accepted by the United States. And even though the quantity of kitchen waste generated at Fort Lewis may not have conformed to Kostelac's pre-bid calculations, this circumstance affords no basis for partially relieving Kostelac from his contract responsibility. 3 Pomeroy's *Equity Jurisprudence* (5th Ed.), § 855; cf. *Triple "A" Machine Shop* v. *United States,* 235 F. 2d 626 (C. A. 9).

Any doubt as to whether the alleged quantitative insufficiency of the waste material affords a basis for excusing Kostelac from full liability is dispelled by

[9] During the five-year period covered by Kostelac's contract, the rations at Fort Lewis varied from a monthly high of 35,139 in July, 1946 to a low of 5,681 in May, 1948 (Exh. 3, p. 3).

[10] *Triple "A" Machine Shop* v. *United States*, 235 F. 2d 626, 631 (C. A. 9).

the contract itself. Article I of the contract (Exh. 1, p. 3) provided as follows:

> No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; *and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected,* the number of kitchens or families, or the number of men subsisted, from time to time. [Emphasis supplied.]

Since Kostelac's contract was in "no sense * * * conditioned on * * * the amount of waste to be collected" plainly the claimed quantitative insufficiency of the waste which was available affords no basis for relieving Kostelac from the immediate consequences of his repudiation of the contract. *Lipshitz & Cohen* v. *United States,* 269 U. S. 90; *Maguire & Co.* v. *United States,* 273 U. S. 67; *United States* v. *Silverton,* 200 F. 2d 824 (C. A. 1); *American Elastics Co.* v. *United States,* 187 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 829.

Moreover, the kitchen waste yield at Fort Lewis during Kostelac's brief performance under the contract was far in excess of the amount of kitchen waste estimated in the contract. With respect to the ".04 pounds per man per day" (Exh. 1, p. 4), the contract estimate of the yield, Kostelac testified as follows (R. 163–164):

> Q. [By Mr. Dovell, Assistant United States Attorney] The garbage that was actually obtained over the period amounted to .04?

A. [By Mr. Kostelac] More than that.

Q. I beg your pardon?

A. More than that. Thirteen times more than that [.52 pounds] every day.

Thus, the contract not only was not conditioned on the amount of waste to be collected, but it appears that the amount actually generated and available was thirteen times in excess of the contract estimate. While Kostelac, in calculating the waste yield, apparently chose to disregard the .04 pounds estimate which appeared in the invitation to bid (R. 125–128) and instead relied largely upon his prior collection experience at other military installations, plainly if his calculations proved erroneous, the resulting predicament is of his own making and affords no basis for absolving him of the full consequences of his subsequent repudiation of the contract. *Maguire & Co.* v. *United States,* 273 U. S. 67, 68–69; *Lipshitz & Cohen* v. *United States,* 269 U. S. 90, 92.

II

The District Court correctly held that Kostelac was not entitled to a rescission of the contract

Since Kostelac's contract was in "no sense * * * conditioned on * * * the amount of waste to be collected" (Exh. 1, p. 3) and since the kitchen waste yield during his performance of the contract was grossly in excess of the contract estimate. Kostelac's asserted miscalculation of the anticipated waste yield at Fort Lewis is immaterial in determining his contract liability. The contract provisions aside, however, there is no equitable basis for a court to relieve

Kostelac of his contract liability. There was not a trace of fraud in the transaction between the United States and Kostelac (R. 196); no evidence of bad faith, and no concealment by the United States of a known fact (R. 59). See *United States* v. *Jones,* 176 F. 2d 278, 285 (C. A. 9).[11] Kostelac's defense to this action rests upon an alleged right to a rescission of the contract because, in his pre-bid estimate of the kitchen waste yield at Fort Lewis, he supposedly labored under the mistaken belief that the waste containers he inspected at Fort Lewis contained a one day accumulation of kitchen waste whereas, he claims, there was, in fact, a two day accumulation.

To rescind a contract because of a unilateral mistake of one of the parties, the mistake must have been material to the transaction, the mistake must not have been the result of negligence, and the right to rescind must be promptly asserted once the mistake has become known. *Grymes* v. *Sanders,* 93 U. S. 55, 62; *United States* v. *Jones,* 176 F. 2d 278 (C. A. 9); 3 Pomeroy's *Equity Jurisprudence* (5th Ed.), § 856. Assuming that Kostelac was actually mistaken, we show that none of these conditions is satisfied under the facts of this case and, further, that by partially performing the contract after the mistake became

[11] Unlike the fact situation in *United States* v. *Jones, supra,* there is no evidence whatever that agents of the United States knew that Kostelac's bid was based upon a mistaken estimate of the kitchen waste yield at Fort Lewis. While Kostelac's bid was higher than other comparable bids ever received at Fort Lewis (R. 64), there was nothing in this fact to put the Government on notice of a possible mistake because never before had the contract been awarded for a five-year period.

known to him, Kostelac waived or lost any right to rescind the contract that he may have had.

A. *The mistake was not material to the transaction.*—We have shown above that under the express terms of the invitation to bid, any contract that might be awarded as a result of the invitation was in "no sense [to] be conditioned on * * * the amount of waste to be collected" (Exh. 1, p. 3). This provision was included in the contract because the quantity of waste to be collected was an inevitable and an inherent uncertainty in the contract. See 3 Pomeroy's *Equity Jurisprudence* (5th Ed.), § 855. In absence of this contract stipulation, it would always be open to a contractor to claim that he entered into the transaction in the mistaken belief that a certain quantity of waste would be available. As this case illustrates, the assertion of such a mistake is not susceptible of objective proof or disproof. It was precisely this type situation which the contract provision with respect to quantity was intended and designed to foreclose.

In this quantitative respect, the contract stipulation bears a close analogy to the "as is, where is" clause common to Government surplus sales contracts or to contracts where there is an express disclaimer of quantitative warranty. It is settled beyond dispute that a party to a contract containing such clauses can make no claim, affirmative or defensive, based upon the failure of the transaction to live up to his expectations, whether with respect to the quantity or quality of the subject matter of the contract. *Maguire & Co.* v. *United States,* 273 U. S. 67; *Lipshitz &*

Cohen v. *United States,* 269 U. S. 90; *Mottram* v. *United States,* 271 U. S. 15; *United States* v. *Silverton,* 200 F. 2d 824 (C. A. 1); *American Elastics Co.* v. *United States,* 187 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 829; *Samuel Furman* v. *United States,* 140 F. Supp. 781 (C. Cls.), certiorari denied, 352 U. S. 847; *Sachs Mercantile Co.* v. *United States,* 78 C. Cls. 801; *General Textile Corp.* v. *United States,* 76 C. Cls. 442; *Yankee Export & Trading Co.* v. *United States,* 72 C. Cls. 258; *Silberstein & Son* v. *United States,* 69 C. Cls. 412; *Snyder Corp.* v. *United States,* 68 C. Cls. 667; *Shapiro & Co.* v. *United States,* 66 C. Cls. 424; *Triad Corp.* v. *United States,* 63 C. Cls. 151. Similarly, to give effect to this contract insofar as it expressly disclaims quantity as condition to the contract, requires that Kostelac's mistaken calculation as to the quantity of waste to be collected be held to be immaterial to the transaction and to preclude rescission of the contract.

B. *The mistake was due to Kostelac's negligent inspection.*—In the invitation to bid, six days were set aside for the inspection of the material offered for sale (Exh. 1, p. 1) and all bidders were "invited and urged to inspect the property to be sold prior to submitting bids." [12] In addition to this general provision, Kostelac, in particular, was urged by the Contracting Officer to inspect the amount of waste that was then being accumulated at mess halls at Fort Lewis. Although six days were set aside for inspection, Kostelac made an inspection only on the first day set aside

[12] General Provision No. 5, Exh. 1, *supra*, n. 2.

for inspection and didn't return for further inspection until the day he submitted his bid (R. 151).

In making his inspection and in estimating the waste generated at Fort Lewis, Kostelac examined the waste containers at some of the mess halls. In examining waste containers at a mess hall, in order to estimate the daily accumulation of waste, one would think that an obvious inquiry to a man of "over twenty years [experience] in handling garbage" (R. 113) would be whether the accumulation under observation represented a one, two or even a week's accumulation. The most reliable way of resolving this inquiry would have been for Kostelac to observe the same container on two or more consecutive days. Kostelac, however, did not do this (R. 151). As noted above, he made his inspection on the first day but did not again return to inspect until the day he submitted his bid (R. 151).

Although, in his inspection, Kostelac talked to mess sergeants and inquired as to the number of men fed at a particular mess, he did not inquire as to whether the waste observed at the mess was a day's accumulation or a week's accumulation. A simple inquiry, such as this, directed to a mess sergeant, would reasonably seem to be an obvious occurrence to a man of Kostelac's experience in the waste collection field. In these circumstances, it is only reasonable to conclude, therefore, that Kostelac's mistaken belief that the waste he actually observed represented a single day's accumulation is attributable to his own negligence and to the manifest inadequacy of his own inspection. A mistake arising in such circumstances affords no ground for relief. *Maguire & Co.* v. *United States*, 273 U. S. 67,

68–69; *Mottram* v. *United States,* 271 U. S. 15; *Triple "A" Machine Shop* v. *United States,* 235 F. 2d 626 (C. A. 9); *United States* v. *Silverton,* 200 F. 2d 824 (C. A. 1); *Triad Corp.* v. *United States,* 63 C. Cls. 151.

C. *Kostelac's delay in renouncing the contract prejudiced the United States.*—For a unilateral mistake of fact to serve as a basis for rescission of a contract, it is fundamental that equity requires a prompt assertion of the right to rescind once the mistake becomes known. *Grymes* v. *Sanders,* 93 U. S. 55, 62; *Robert Hind, Limited* v. *Silva,* 75 F. 2d 74, 79 (C. A. 9). A corollary to this equitable principle is that performance under the contract after the mistake becomes known, operates as a waiver of any right to rescind that otherwise might have existed. *American Elastics Co.* v. *United States,* 187 F. 2d 109, 113–114 (C. A. 2), certiorari denied, 342 U. S. 829; *Grymes* v. *Sanders,* 93 U. S. 55, 62.

The mistake upon which Kostelac predicates his right to rescind became known to him within three or four days (R. 195) after he commenced performance of the contract. As the district court observed (R. 196–197):

> [I]f Mr. Kostelac had taken the position promptly and within a reasonable time that there was no contract at all because of the alleged mistake, and had he then demanded that the contract be declared at an end and he be freed of its obligations, it is quite possible that demand might have been accepted at that time because within a few days of the letting of the contract, other arrangements for the collection of the garbage could readily have been made

with some of the other bidders on the same contract, who at that time, presumably, were in business, set up and ready to take on the responsibilities of collecting garbage at the Fort.

DeBoer, for example, had his organization, his farm and swine, his workers, his equipment, and so on, and had that rescission occurred, in all likelihood a new arrangement for the collection of the garbage could have been made with little, if any, damage to anyone; but Mr. Kostelac did not take that position.

Instead, Kostelac collected and removed the kitchen waste according to the contract terms until December 15, 1946 when the contract was re-let to John DeBoer after Kostelac refused to pay for the waste as his contract required. In the interim between July 1 and December 15, 1946, DeBoer, who had the Fort Lewis waste contract prior to Kostelac, laid off his men and dismantled his hog ranch (R. 191). When asked in December to assume the Kostelac contract, DeBoer was not prepared to handle the contract (R.191) and for that reason he "couldn't bid any more on the garbage at that time" (R. 191).

In this case, therefore, for nearly five and one-half months after he knew of his mistake, Kostelac, except for nonpayment, performed under the contract in a manner inconsistent with any right of rescission; in this period he collected and had available for use, the waste generated at Fort Lewis and to this day, as his appeal to this Court demonstrates, he continues to resist payment for the material he actually received; and, by his failure promptly to renounce the contract, a change of circumstances occurred as a result of

which the United States was compelled to accept a less favorable contract price for the balance of the five-year period. As the district court rightly concluded (R. 195–197), in these circumstances there is no basis for a rescission of the contract. *American Elastics Co.* v. *United States,* 187 F. 2d 109, 114 (C. A. 2), certiorari denied, 342 U. S. 829; *Grymes* v. *Sanders,* 93 U. S. 55, 62–63.

III

The District Court correctly held that Kostelac's liability on the contract was covered by the bond guaranteeing performance of the contract

General Provision No. 1 of the invitation to bid (Exh. 1) specified that "bids must be accompanied by cash, certified checks, bond, or postal money order made payable to the Treasurer of the United States in the amount of at least twenty per cent (20%) of the total sum of the bid." In compliance with this specification, Kostelac's bid was accompanied by a bond, with himself as principal and the Maryland Casualty Company as surety, in the penal sum of $40,000 (Exh. 1, p. 7), an amount equal to twenty per cent of the estimated receipts ($200,000) to be derived from Kostelac's bid and contract (Exh. 1). General Provision No. 1 further provided, in effect, that if a contract was awarded as a result of the bid, the amount accompanying the bid "will be retained [by the United States] as guarantee for the faithful performance of all the terms and conditions of the purchase."[13]

[13] The bond furnished by Kostelac makes express reference to the invitation to bid (Exh. 1, p. 7). It is settled, of course, that the contract and the bond which it guarantees must be read to-

Thus, the bond furnished by Kostelac was given for the express purpose of guaranteeing the faithful performance of all the terms and conditions of the contract. The district court found as a fact (R. 79) and held (R. 82) that Kostelac's liability was within the intent and purpose of the bid and performance bond and that the Maryland Casualty Company was liable to the United States as surety on the bond.

In their "Statement of Points" on appeal (R. 205–208) Kostelac and his surety state that (R. 208):

> There was no proof of breach of the conditions of the bond sued upon herein, but the evidence conclusively shows that there was no breach of such bond.

The basis for this assertion is far from clear. Kostelac, of course, repudiated his five-year contract after only five and one-half months of part performance. In the face of such conduct, neither Kostelac nor his surety can seriously suggest that there has been a "faithful performance of all the terms and conditions" of the contract as guaranteed by the bond.[14] Any argument to the contrary is transparently unsubstantial.

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gether to determine the surety's obligation. *Martin* v. *National Surety Co.*, 300 U. S. 588; *Century Indemnity Co.* v. *United States*, 236 F. 2d 752, 754.

[14] Kostelac and the Maryland Casualty Company, in denying liability on the bond, rely upon a literal interpretation of the conditions spelled out in the bond. Their view, which would render the bond a nullity, ignores the intent and purpose of the bond as well as the contract provision pursuant to which it was furnished.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court, as to Kostelac, should be modified so as to award the United States full compensation for its loss, $104,363.40. As to the Maryland Casualty Company, the judgment should be modified by increasing its liability to $40,000, the full amount guaranteed by the bond.

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